United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Appellee's Brief (Original)

74-1455

To be argued by
JOAN E. O'BRIEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1455

UNITED STATES OF AMERICA,

Appellee,

—against—

LINDA H. SCHWARZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 2

ARGUMENT:

POINT I—A specific "no benefit" finding by the District Court is not required before the imposition of sentence upon a young adult offender 3

POINT II—The District Court's sentence was not the result of a fixed or irrational sentencing policy 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

McGee v. *United States*, 462 F.2d 243 (2d Cir. 1972) 6

United States v. *Brown*, 470 F.2d 285 (2d Cir. 1972) 5

United States v .*Kaylor*, 491 F.2d 1133 (2d Cir. 1974) (*en banc*) 3

United States v. *Tucker*, 404 U.S. 443 (1972) 6

Woolsey v. *United States*, 478 F.2d 139 (8th Cir. 1973).. 5, 6

Statutes:

Youth Corrections Act, Title 18, United States Code, Section 5005, *et seq.*, Title 18, United States Code, Section 4209 2

Other Authorities:

Annual Report of the Director, Administrative Office of the United States Courts, 1973 6

Administrative Office of the United States Courts, *Federal Offenders in the United States District Courts*, 1971 6

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FOR THE SECOND CIRCUIT

Docket No. 74-1455

UNITED STATES OF AMERICA,

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—against—

LINDA H. SCHWARZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Linda H. Schwarz appeals from a judgment of conviction entered on March 25, 1974 in the United States District Court for the Eastern District of New York (Travia, *J.*), convicting her upon her plea of guilty, of knowingly possessing with the intent to distribute approximately four ounces of cocaine in violation of Title 21, United States Code, Section 841(a)(1). Appellant was sentenced to four years imprisonment pursuant to Title 18, United States Code, Section 4208(a)(2) and three years special parole. The District Court denied appellant's request to be treated as a "young adult offender" under the provisions of Title 18, United States Code, Section 4209.

On appeal, appellant claims that the sentence should be vacated because the District Court did not specifically find that appellant would derive "no benefit" from a sentence

imposed under 18 U.S.C. § 4209 and the provisions of the Youth Corrections Act (18 U.S.C. § 5005 *et seq.*) and that the four year sentence was based upon a fixed or mechanical sentencing policy and irrational criteria.

Statement of Facts

On February 19, 1974, appellant Linda H. Schwarz waived indictment and entered a plea of guilty before Chief Judge Jacob Mishler to the charge of knowingly possessing with the intent to distribute four ounces of cocaine. At the plea, Chief Judge Mishler ascertained that no promises or suggestions as to sentence were made by either defense counsel or the United States Attorney to induce the plea of guilty (T.P.* 6). After the plea was accepted, appellant's attorney, Howard Diller, requested that sentencing be scheduled before March 26, 1974, appellant's twenty-sixth birthday, in order that she be eligible for a sentence under the "Youth Corrections Act" (T.P. 9).** Judge Mishler informed appellant that he would send a memo to the sentencing judge requesting that the sentencing date be fixed before appellant's birthday. Chief Judge Mishler admonished appellant that she should not consider his action as an "indication that you will be sentenced under the Youth Corrections Act" (T.P. 9).

The sentencing was scheduled for March 25, 1974 before Judge Anthony J. Travia. After the District Court and defense counsel discussed the probation report, Judge Travia specifically requested that Mr. Diller direct his comments to

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* T.P. refers to the minutes of the plea on February 19, 1974.

** The Court and counsel referred to the "Youth Corrections Act." However, the appellant was not eligible to be classified under the Federal Youth Corrections Act as a "youth offender" (one under 22 years of age) under 18 U.S.C. § 5006(e), but was rather a "young adult offender" under 18 U.S.C. § 4209 who might be afforded the benefits of the Federal Youth Corrections Act in the discretion of the court.

the possible imposition of sentence under the "Youth Corrections Act (T.S. 8).*

After Mr. Diller had concluded his comments, the District Court denied the request for Youth Corrections treatment. Judge Travia noted his awareness of Youth Corrections treatment but found that after reading all the letters submitted on behalf of the appellant, the presentence report and the recommendations of the sentencing panel, the appellant should be sentenced as an adult (T.S. 18-22). Accordingly, Linda Schwarz was sentenced to a term of imprisonment for four years under Title 18, United States Code, Section 4208(a)(2).

ARGUMENT

POINT I

A specific "no benefit" finding by the District Court is not required before the imposition of sentence upon a young adult offender.

Appellant argues as error the refusal of the District Court to make a specific finding of "no benefit", citing the recent decision of this Court of *United States* v. *Kaylor,* 491 F.2d 1133 (2d Cir. 1974) (*en banc*). *Kaylor* makes it quite clear that the language of the Youth Corrections Act requires a sentencing judge to make an explicit finding that an eligible defendant would derive no benefit from treatment under the Act before sentencing that defendant as an adult. Id. at 1138. This case, however, does not fall within the scope of *Kaylor,* as appellant might wish this Court to believe. Appellant was simply not eligible for sentencing as a youth offender.

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* T.S. refers to the minutes of the sentencing on March 25, 1974.

The Youth Corrections Act is applicable to a "youth offender", *i.e.,* one under twenty-two years of age at the time of sentence (18 U.S.C. § 5006(e)). Rather than being eligible as a "youth offender", appellant was eligible as a "young adult offender", *i.e.,* one between the ages of twenty-two and twenty-six under Title 18, United States Code, Section 4209, which allows a "young adult offender", in the discretion of the Court, the benefits of Youth Corrections treatment. There is a crucial difference between these two classifications, however. A "youth offender" must receive youth corrections treatment unless the Court specifically finds that the youth offender will *not* derive a benefit from such a treatment. 18 U.S.C. § 5010(d). As *Kaylor* illustrated, there is a statutory presumption in the Youth Corrections Act that one under twenty-two will derive benefit from such treatment, which presumption does not apply to "young adult offenders". *Id.* at 1137-1139. As Judge Oakes observed in writing the unanimous opinion of this Court sitting *en banc,* "Quite evidently Congress intended to prefer treatment under the Youth Corrections Act for *youth offenders,* while it meant to permit such treatment only after affirmative findings in the case of *young adult offenders.*" *Id.* at 1137 (emphasis in original) (citation omitted). Specifically, Section 4209 clearly states that Youth Corrections treatment may be provided only if the "court finds . . . reasonable grounds to believe that the defendant will benefit" from youth treatment. 18 U.S.C. § 4209.

Thus, absent the statutory presumption applicable to "youth offenders" the Court did not err in refusing to make an explicit "no benefit" finding or in denying Youth Corrections treatment.

POINT II

The District Court's sentence was not the result of a fixed or irrational sentencing policy.

Appellant also argues that the sentence should be vacated because it demonstrated a fixed and mechanical method of sentencing drug offenders, was based on irrational criteria and did not comport with certain statistical surveys.

There is no dispute that a sentence should be invalidated when there is some evidence that the court employed a fixed or mechanical approach in imposing sentence. *United States* v. *Brown,* 470 F.2d 285 (2d Cir. 1972); *Woolsey* v. *United States,* 478 F.2d 139 (8th Cir. 1973). There is absolutely no evidence here, however, that Judge Travia employs a fixed policy in sentencing drug offenders. Undoubtedly, the seriousness of the crime was one factor that the District Court took into consideration in sentencing (T.S. 15, 25-26). It was, however, not the only one. Indeed, the District Court considered a variety of factors in arriving at the sentence:

> "I have read this presentence report maybe five times already. I have read every letter that was sent to me by a number of people which I have shown you.
>
> . . .
>
> I think as a result of a thorough consideration of this report and all these letters I have received, I think I have been informed pretty much . . . of the pertinent facts relating to this young lady. Certainly, from the presentence report and these letters I have received and from your remarks. And I must say, too, that I have discussed this case with my colleagues who are part of the so-called presentencing panel and I thought about it very thoroughly—very thoroughly" (T.S. 16-17).

Nor was the District Court's determination founded upon the "dumb kid" criterion argued by appellant. While Judge Travia considered appellant's advantages of education and wealth, he did not see how these advantages mitigated appellant's guilt (T.S. 10, 13, 14, 25). To argue that the District Court was required to automatically lessen a sentence for these reasons, would indeed result in a sentencing policy unfair to disadvantaged defendants.

Finally, appellant argues that the sentence was excessive as evidenced by certain statistical surveys. *See Woolsey* v. *United States, supra* at 147, n.7. Appellant states that the average sentence of all types of drug offenders in the ninety federal district courts for the year ending June 30, 1973, was 45.5 months.[1] At the outset, the difference between 45.5 month average and the 48 month sentence here is so minuscule as not to warrant comment. Furthermore, the same table indicates that the average sentence for *narcotic* drug offenders was 58.4, well above the sentence imposed on appellant.[2]

In summary, the sentence imposed here, well within the fifteen year statutory maximum, should not be subject to review. *United States* v. *Tucker,* 404 U.S. 443 (1972); *McGee* v. *United States,* 462 F.2d 243 (2d Cir. 1972). In addition, appellant was sentenced under Title 18, United States Code, Section 4208(a)(2) and is therefore eligible for parole at *anytime* that the Board of Parole may determine. There is absolutely no evidence presented that in-

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[1] Annual Report of the Director, Administrative Office of the United States Courts, 1973 at p. A-51, Table D5.

[2] *See also* Administrative Office of the United States Courts, *Federal Offenders in United States District Courts,* 1971 at p. 134-135, Table D18. The average sentence for all drug violators (excluding marijuana) for all the circuits in 1971 was 65.4 months, ranging from a low of 53.4 months (third circuit) to a high of 150.6 months (eighth circuit).

dicates the District Court employed a fixed or mechanical sentencing policy or that it was based on irrational criteria or was otherwise unfair. Accordingly, the sentence should not be vacated.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

June 19, 1974

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* The United States Attorney's Office wishes to acknowledge the assistance of Michael H. Berns in the preparation of this brief. Mr. Berns is a third year law student at Hofstra University Law School.

Form No. USA-52a-6a
(Rev. 1-29-71)

★ U. S. Government Printing Office 1974— 719—500—18

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 19th day of June, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ 2 copies of the ~~BRIEF FOR THE APPELLEE~~ of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Diller & Schmukler, Esqs.
299 Broadway
New York, N. Y. 10007

Sworn to before me this
19th day of June, 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly **entered** herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COU
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____,

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Attorney for _____

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